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United Nations Commission on International Trade Law

Forty-first session

Summary record of the 865th meeting
Held at Headquarters, New York, on Monday, 16 June 2008, at 10.30 a.m.

Temporary Chairperson: Mr. Michel (Under-Secretary-General for Legal Affairs, The Legal Counsel)
Chairperson: Mr. Illescas ..... (Spain)

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The meeting was called to order at 10.55 a.m.

Opening of the session

1. **The Temporary Chairperson** declared open the forty-first session of the United Nations Commission on International Trade Law (UNCITRAL). He said that much of the work of the United Nations system rarely made headlines, yet that quiet work was an integral part of its objectives to promote higher standards of living, social progress and economic development. The Charter of the United Nations offered a framework of values that contributed to the emergence of a fair and inclusive global economy, and the Organization established global norms and standards to further develop those values. That standard-setting work had become ever more important in an era of globalization. The work of the Commission resulted in closer international ties and greater domestic economic stability, two essential conditions for international peace and human development.

2. The main item on the agenda for the forty-first session was the consideration of the draft convention on contracts for the international carriage of goods wholly or partly by sea, which was to be submitted to the General Assembly for adoption at its sixty-third session. Few industries were by nature as international as the transportation industry or therefore in greater need of modern, predictable and uniform rules to support its transactions. The draft convention was a comprehensive instrument that would make the law better suited to the current realities of commerce and would reduce the cost of transactions.

3. Commercial fraud, also on the agenda, posed a considerable obstacle to the growth of international trade. In addition to actual financial losses suffered by victims of fraud, fraudulent practices had a broader negative effect in that they undermined confidence in legitimate trade instruments. The Secretariat, at the Commission's request, had submitted a note setting out 23 indicators of commercial fraud, accompanied by illustrations and advice. The Commission might wish to publish those indicators for use by its secretariat in providing technical assistance, and by Governments and international organizations in their initiatives against fraud.

4. The Commission also had a role to play in the broad work of the United Nations to strengthen the rule of law. In accordance with General Assembly resolution 62/70, inviting comment on the role of the Commission in promoting the rule of law, it had taken an interest in seeing its work integrated into the Organization's broader efforts in that area. Through its work in the areas of arbitration and mediation, in particular, and its technical assistance programme, the Commission helped to build institutional capacities and mechanisms for effective enforcement. Effective commercial law played a supportive role in addressing root causes of many international problems, such as migration caused by impoverishment, inequality and internal conflicts, or inequitable access to shared resources, and constituted the foundation of regional and global economic integration. The promotion of arbitration, conciliation and mediation in the resolution of cross-border disputes was also helpful in preventing isolated disagreements from escalating into political conflicts. Modern rules on commercial law that enhanced transparency in international transactions were also useful in helping to prevent cross-border economic crimes and financing of terrorism.

5. The Commission would also consider its own methods of work at the session. The debate was timely, taking place after the increase in membership from 36 to 60 and the broadening of the spectrum of observers that might participate in its deliberations. Fine-tuning of its working methods and publication of its practices would facilitate the participation of members and observers and further strengthen its position as the leading global agency for rule formulation.

Election of officers

6. **Mr. Delebecque** (France), supported by **Mr. Sharma** (India), **Mr. Sato** (Japan), **Mr.** Ibrahima Khalil **Diallo** (Senegal), **Mr. Elsayed** (Egypt), **Mr. Lebedev** (Russian Federation) and **Mr. Hu** (China), nominated Mr. Rafael Illescas (Spain) for the office of Chairperson of the forty-first session of the Commission.

7. *Mr. Illescas (Spain) was elected Chairperson by acclamation.*

8. *Mr. Illescas (Spain) took the Chair.*

Adoption of the agenda (A/CN.9/644)

9. **Mr. Delebecque** (France) said that the agenda item entitled "Working methods of UNCITRAL" was of major importance and sought assurances that its

consideration would be given adequate time in the Commission's schedule.

10. **The Chairperson** said that, although a final programme of work had not yet been drawn up, that request would be taken into consideration.

11. *The agenda was adopted.*

Finalization and approval of a draft convention on contracts for the international carriage of goods wholly or partly by sea (A/CN.9/642, A/CN.9/645, A/CN.9/658 and Add.1-13)

12. **The Chairperson** drew attention to the text of the draft convention, which was contained in document A/CN.9/645. The text represented six years of work by the Working Group, which had spent a total of 180 working days on the draft within the past year.

13. As had been noted at the end of the Commission's fortieth session, the draft convention constituted no more than a proposal, notwithstanding the long and intensive discussions within Working Group III (Transport Law). The Working Groups were subsidiary bodies of the Commission, which had sovereign power to review their proposals, as was its consistent practice. Its method of review would be consensus-based, like the work of the Working Group itself, which had produced a text that reflected the prevalent views of its members.

14. He expressed appreciation for the input of non-governmental observers and hoped that they would continue to allow the Commission to benefit from their valuable experience. However, in the interest of completing the Commission's work at the current session, their views would not be taken into account in the finalization of the draft.

15. The draft instrument had much to recommend it and was already serving as a benchmark for regional instruments. However, the existence of such regional agreements might complicate the universal implementation of the draft convention, once approved, and that was a further factor that should encourage the Commission to conclude its work during the current session.

16. Turning to the text of the draft convention, he proposed that draft article 1, which set out definitions of important terms used therein, should not be discussed in a void but rather should be referred to, as appropriate, in the course of reviewing the subsequent articles. He invited members of the Commission to make general comments before undertaking an article-by-article analysis.

17. **Mr. Elsayed** (Egypt) said that his delegation, which was currently chairing the League of Arab States, had made a careful study of the draft convention. It had found some overlapping in the definitions, some aspects that had not been addressed, and some articles that needed to be corrected. A leading concern should be to ensure a balance between the parties involved in maritime transport and to provide clearly for the responsibility and accountability of carriers.

18. **Mr.** Ibrahima Khalil **Diallo** (Senegal) said that Senegal along with other African countries had actively participated in the work of the Working Group and was happy to see many of its positions reflected in the draft. While it was not satisfied with some of its parts, it was prepared to set aside its reservations in the interest of consensus.

19. **Mr. Blake-Lawson** (United Kingdom) said that the United Kingdom's comments on the draft (A/CN.9/658/Add.13) might not have been seen, owing to their tardy submission, and he invited delegations to read them. His delegation generally supported the draft text, which would contribute to the greater harmonization of international law, but in the interests of strengthening legal certainty it had put forward proposals concerning the definition of "contract of carriage" and chapters 9 and 11.

20. **Mr. Baghaei Hamameh** (Islamic Republic of Iran) said that his delegation was generally supportive of the draft convention. In keeping with its core mandate, the Commission should regulate the rules governing international carriage of goods by sea with a view to facilitating international trade and to ensuring a balance between the interests of the carriers, shippers and third parties concerned. While the draft convention, upon its adoption, would help to settle potential disputes between them, it should not supersede general principles of international law in such areas as maritime safety and protection of the marine environment. Draft article 18, paragraph 5 (a), which did not duly take into account the work done by the International Maritime Organization, could well undermine the safety of shipping, particularly when compared with the more effective legal regime of presumed fault. Moreover, the Commission should

exercise caution in determining carriers' liability, which, in view of its possible effects on commercial shipping activities and the conditions of the insurance market, should be increased as little as possible. The necessary revisions should be made to the draft instrument before its adoption, so as to increase the chances of its being ratified by a large number of States, particularly developing countries.

21. **Mr. Tsantzalos** (Greece) expressed broad support for the draft convention, pointing out that lack of uniformity in international trade law impaired legal and commercial certainty and could therefore militate against international trade.

22. **Ms. Carlson** (United States of America) said that her delegation strongly supported the current text of the draft convention, which had been agreed upon by Working Group III (Transport Law) as a result of painstaking compromises negotiated over a period of six years. While certain amendments to the present text were inevitable, it was important to bear in mind that the wording represented a delicate balance of interests: a change to any part of the text might have wider implications for the text as a whole, even threatening the widespread ratification of the draft convention itself. The current text should therefore be approved in substantially the same form as that approved by the Working Group.

23. **Mr. Sharma** (India) recalled that the current text of the draft convention was the result of hard-won efforts to achieve consensus on a number of issues over a six-year period. Consequently, while small corrections to clarify parts of the text could prove helpful, great care must be taken not to undermine the consensus that had already been achieved. Indeed, all the possible scenarios with respect to the more contentious issues, such as the limitation of liability, had already been discussed in detail, and the definitive positions had been set down in the current text. The draft convention should therefore be adopted substantially in its current form.

24. **The Chairperson** said he took it that the Commission wished to consider the draft convention article by article, together with the related definitions in each case.

25. *It was so decided.*

Draft article 2 (Interpretation of this Convention)

26. *Draft article 2 was approved in substance and referred to the drafting group.*

Draft article 3 (Form requirements) and the definition of "electronic communication"

27. **Mr. Sato** (Japan) suggested that references to draft article 24, paragraph 4, draft article 69, paragraph 2, and draft article 77, paragraph 4, should be included in the text of draft article 3.

28. **Mr. Miller** (United States of America), supported by **Mr. Fernández** (Spain) and **Mr. Zunarelli** (Italy), expressed support for the proposal of the delegation of Japan.

29. **The Chairperson** said he took it that references to draft article 24, paragraph 4, draft article 69, paragraph 2, and draft article 77, paragraph 4, should be included in the text of draft article 3.

30. *It was so decided.*

31. **Mr. Oyarzábal** (Observer for Argentina) asked whether the definition of "electronic communication" in draft article 1, paragraph 17, should include the requirement that it identified the originator, in line with corresponding definitions in the UNCITRAL Model Law on Electronic Signatures and the UNCITRAL Model Law on Electronic Commerce.

32. **Mr. Sekolec** (Secretary of the Commission) pointed out that a clear distinction was drawn in UNCITRAL instruments on electronic commerce between the definition of "data message", analogous to "electronic communication" in the draft convention, and the definition of "electronic signature". The experts of Working Group III (Transport Law) and Working Group IV (Electronic Commerce) had agreed in their consultations that attributing authorship of a communication to a person was a function of the signature rather than of the communication itself. Consequently, reference to the originator of the communication had deliberately been omitted in the present definition of "electronic communication", since identifying the originator was a function of the signature.

33. *Draft article 3 and draft article 1, paragraph 17, were approved in substance and referred to the drafting group.*

Draft article 4 (Applicability of defences and limits of liability)

34. *Draft article 4 was approved in substance and referred to the drafting group.*

Draft article 5 (General scope of application) and the definitions of "contract of carriage", "carrier" and "shipper"

35. **Ms. Czerwenka** (Germany) expressed her delegation's serious concerns about the broad scope of the draft convention and, in particular, the establishment of special rules applying to multimodal transport contracts that provided for carriage by sea, which would lead to a fragmentation of the laws on multimodal transport contracts. To avoid that outcome, her delegation wished to see the draft convention applied solely to maritime transport contracts. In that connection, she also noted that her delegation would raise substantive concerns with respect to draft article 27 at the appropriate juncture.

36. **Mr. Blake-Lawson** (United Kingdom) said that his delegation shared many of the concerns expressed by the delegation of Germany and had particular concerns related to the definition of "contract of carriage", as set out in draft article 1, paragraph 1. Under the current definition, it was essential to the application of the draft convention that the contract, either expressly or by implication, should provide for the goods to be carried by sea. However, many contracts, for good commercial reasons, allowed the means of transport to be left entirely or partially open. Thus, if a contract was not "mode specific", it might appear that the draft convention would not apply, unless a requirement for carriage by sea could be implied.

37. Proposals had been made at various stages to add some words to the definition to indicate that a contract permitting carriage by sea would be deemed a contract of carriage for the purposes of the draft convention in cases where the goods were in fact carried by sea. Nevertheless, those proposals had so far been rejected. His delegation was of the view that even without such words the draft convention would apply to goods carried wholly or partly by sea, where the contract permitted such carriage. However, the draft convention was not clear on that point.

38. The present unsatisfactory situation led to the distinct possibility that, once the draft convention was adopted, it would have a partial and uncertain field of application. That likelihood was increased by the requirement in draft article 5 that, according to the contract of carriage, the place of receipt, the port of loading, the place of delivery or the port of discharge must be located in a contracting State. It followed that, if neither the place of receipt nor the place of delivery was in a contracting State, and no port of loading or port of discharge was specified in the contract, the draft convention might not apply, even though the actual ports of loading and discharge were in fact in contracting States.

39. Prior to the approval of the draft convention by the Commission, the definition of "contract of carriage" and the terms of draft article 5 should therefore be clearly amended to bring within the scope of the draft convention all carriage by sea where the actual port of loading or the actual port of discharge was in a contracting State. Such an amendment should also entitle a court to have due regard not only to the contract of carriage, but also to how the goods were in fact carried.

40. **Mr. Elsayed** (Egypt) said that that draft article 5 should not begin with the phrase "Subject to article 6".

41. **Ms. Downing** (Australia) said that the alternate text proposed by her delegation in its written comments (A/CN.9/658, para. 18) would clarify the scope of application and address some of the concerns expressed by the representatives of the United Kingdom and Germany.

42. **Mr. Miller** (United States of America) said that it was important to recall the significant efforts made by the Working Group over many weeks in formulating the draft convention, which the Commission would have only nine days to review in its entirety. The German proposal to eliminate the "maritime plus" aspect of the draft convention would undo five of the six years of the Working Group's work. Not only had it been agreed upon at an early stage that the draft convention would be a "maritime plus" convention, but also the "maritime plus" approach was best suited to the manner in which the business community operated. It would be unwise for the Commission to impose another type of legal regime on the business community's operations or to reopen such a fundamental question without strong justification.

43. The United Kingdom's proposal had been carefully considered and ultimately rejected in the

Working Group, which had assumed that most courts would understand that an implied modification of the contract would result if the contract permitted the carriage of goods by sea and the goods were in fact carried by sea. Whether the Working Group's assumption was correct would be determined once the courts began reviewing relevant cases. His delegation would prefer that draft article 1, paragraph 1, should remain unchanged.

44. **Mr. Mayer** (Switzerland) expressed his delegation's support for the statement made by the representative of the United States.

45. **Mr. Sato** (Japan) also endorsed the statement made by the representative of the United States. Although his delegation shared the United Kingdom's concern to some extent, the matter had already been debated at length at the Working Group's fifteenth session, and the discussion was covered in its report (A/CN.9/576, para. 33). If there was an option under the contract of carriage to choose a port of loading or discharge within a contracting State, the convention would apply. The prevailing view in the Working Group was that an explicit provision for that practice was unnecessary and potentially misleading.

46. The issue of modality in the contract of carriage, raised by the German delegation, was dealt with in articles 27 and 84 and could be resolved during the discussion of those articles.

47. **Mr. Zunarelli** (Italy) said that his delegation agreed with the views expressed by the representative of the United States and supported by the representatives of Switzerland and Japan. The Working Group had held its discussions on the assumption that the "maritime plus" approach had been adopted; therefore, it should not be changed.

48. **Mr. Romero-Naser** (Honduras) said that the authorities in several States members of the Commission had taken note of the specific advances made and that the Commission should not undo those advances. His delegation encouraged all Commission members to support the statement made by the United States.

49. **Mr. Delebecque** (France), echoing the sentiments expressed by the delegations of the United States, Italy and Japan, said that his delegation did not wish to reopen the discussion of the definition of "contract of carriage", which had been debated at length and was perfectly acceptable in its present form. The formulation "shall provide for carriage by sea" was flexible enough to cover many transport operations and it broadly defined the scope of application. Technical questions that the Commission did not consider to be essential should be addressed by the courts.

50. **Mr. Ndzibe** (Gabon) said that his delegation was hesitant about the German delegation's proposal to restrict the draft convention's scope of application. In its current form, the scope of application was much broader and covered pre- and post-delivery. His delegation supported the position expressed by the delegations of the United States and France.

51. **Mr. Elsayed** (Egypt) said with reference to the definitions in draft article 1, paragraphs 5 and 8, that he understood the term "carrier" to mean the person who pledged to carry the goods from one place to another in return for a fee, as one of the two parties to the contract and the term "shipper" to mean the person who delivered the goods to the carrier, transported the goods from one place to another and concluded the contract of carriage.

52. **The Chairperson** said he took it that the majority of the Commission members wished draft article 5 and the definitions of "contract of carriage", "carrier" and "shipper" set out in draft article 1, paragraphs 1, 5 and 8, to remain unchanged.

53. *Draft article 5 and draft article 1, paragraphs 1, 5 and 8, were approved in substance and referred to the drafting group.*

The meeting rose at 1 p.m.